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In the Supreme Court of the United States

October Term, 1940

No. ~~1008~~ 64

CLYDE HYSLER,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

While the petition fails to show definitely the question presented for the consideration of this court it is presumed that the first paragraph under "B. Reasons relied on for the allowance for the writ of certiorari" expresses the question. The question as stated, however, is not correctly phrased and we shall show that it is not based in its entirety upon matters shown in the affidavits supporting the application for leave to file petition for writ of error coram nobis in the circuit court of Duval County, Florida.

We have not been furnished with any copy of the transcript of record and can only identify the matters to which we may refer by the style of the pleading together with the paragraphs and pages therein and the exhibits thereto.

Wherever reference is made to the Chambers case without any citation as to the place reported, it is to the opinion of this court found in 309 U S 227.

STATEMENT AS TO JURISDICTION

Petitioner has cited the appropriate section of the United States Judicial Code which authorizes this court to bring up for review and determination a final judgment of the highest court of a state wherein the particular matter may be considered when such judgment is claimed to be violative of some provision of the Constitution of the United States. Petitioner contends that the decision by the Supreme Court of Florida in the case of Hysler v State of Florida rendered on April 12, 1941 is violative of the provisions of the Fourteenth Amendment to the Constitution of the United States and cites four cases to support his contention.

The cases of Strauder v West Virginia, 100 U S 303, and Neal v Delaware, 103 U S 370, both involve a matter of discrimination between white and black citizens in the selection of jury lists. The cases of Brown v Mississippi, 297 U S 278; 80 L ed 682 and Chambers v Florida, 309 U S 227, 60 S Ct 472, 84 L ed 716, both involve convictions based upon confessions of the accused obtained by violence. None of the four cases are therefore in point as to this case wherein it is claimed that violence was inflicted upon one witness who after a wait of four years states that such alleged violence caused him to testify falsely against the petitioner.

STATEMENT OF CASE

There are certain parts of the statement of the case in the brief of petitioner which are not in accordance with the facts and beginning with the third paragraph it contains the argument of counsel and not a statement of the case.

Beginning at line 9 of the petitioner's brief under this heading is the following statement:

"At the trial of Petitioner, the only testimony to connect this Petitioner with said crime was the testimony

of James Baker and Alvin Tyler, each of whom testified that this Petitioner had planned the robbery in which John H. Surrency and Mayme Elizabeth Surrency were killed; and it was solely upon the testimony of James Baker and Alvin Tyler that Petitioner was convicted."

and again beginning at line 21 there appears the following statement:

"That he and Alvin Tyler both falsely testified against this Petitioner because of beatings administered to them by the law enforcement officers of Duval County, Florida and the promises made them, that if they would testify against Petitioner and implicate him in said crime that they would see that the witnesses escaped the death penalty."

The transcript of record in the appeal of petitioner to the Supreme Court of Florida from his conviction in the circuit court of Duval County for the murder of Mayme Elizabeth Surrency shows testimony other than that of the negroes Baker and Tyler which corroborates their testimony and definitely connects Hysler, petitioner herein, with the crime. The affidavits of Baker nowhere show that Tyler was beaten or promised any reward to give false testimony. Excerpts from such transcript will be quoted under our argument.

ARGUMENT

HAS THE PETITIONER BEEN DENIED THE EQUAL PROTECTION AND DUE PROCESS OF THE LAW AS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

The Supreme Court of Florida in denying leave to file

a petition in the circuit court of Duval County, Florida, for writ of error coram nobis held that there had been no such denial of the equal protection and due process of the law as guaranteed by the 14th Amendment to the United States Constitution and listed eight reasons why the application should be denied. Counsel for petitioner has based almost his entire argument against the validity of these reasons in his statement of the case instead of under the heading "Argument" where it properly belongs. We will consider these reasons in the order given in the opinion of the Supreme Court of Florida.

(a) THERE IS AMPLE EVIDENCE TO SUPPORT THE JUDGMENT OF CONVICTION WITHOUT THE AID OF THE TESTIMONY GIVEN AT THE TRIAL BY JAMES BAKER.

In order that this court may be saved the labor of reading more than 1500 pages of testimony, we will refer briefly to the evidence so as to show that there was testimony other than that given by Baker which might support the verdict of guilty. Numbers shown after such references are the page numbers where such testimony may be found in the bill of exceptions on the appeal to the Supreme Court of Florida.

The petitioner in his direct examination at the trial stated that he saw James Baker on November 20, 1936 and was asked by Baker for a job hauling whiskey (1697-98); that he took a load of moonshine liquor from Jacksonville to Orlando the following Sunday night November 22 getting back early Tuesday morning November 24 (1702); that he was due to take another load to Palatka on Wednesday, November 25 and went to town Tuesday afternoon to arrange with some one to take the load (1702-03); that he saw Baker with whom was Tyler and arranged for Baker to take the whiskey (1703-04); that he then went to Robert E Lee High

School to see Miss Newsom, a teacher, about borrowing her car (1705-06) and that night arranged with her to take it the next morning (1709-10); that Wednesday morning he met Baker and Tyler and took them to the high school where he had Tyler get Miss Newsom's car (1712); that he then had Baker drive the car with Tyler and gave him some money to get gasoline and told Baker to meet him at Lenox and Edgewood (1713); that he waited at that corner from approximately 9 o'clock to 10:30 o'clock A. M. and then drove to Bud Gardner's house (1714-15); that from then until the middle of the afternoon he was with Bud (1718-25). On cross-examination he stated that while he was waiting at Lenox and Edgewood for the negroes he saw several people, naming them (1811-12), but none of these people were put on the stand to corroborate his statement.

The testimony of Tyler, a witness for the State, was like that of the petitioner in certain parts. After being warned by the trial judge of his constitutional rights (881-83), he stated that he had known the petitioner only since November 24, 1936 (884-85, 889) at which time he was with Baker and got in petitioner's car (890-92); that petitioner said he would see them the next morning (902); that the next morning, Wednesday, November 25, the petitioner came for them and took them to the high school where he, Tyler, got Miss Newsom's car. (903-04.)

Except for the foregoing testimony the statements of petitioner and Tyler do not agree. Tyler stated that the petitioner took Baker and himself out Kings Road on the afternoon of November 24, discussed the proposed robbery of Mr. Surrency and showed them the different roads (894-95); that while they were driving around they met two ladies in a car at a cross road (898-99); that petitioner showed them a gun which they could use (907-08); that

next morning after getting Miss Newsom's car he went in petitioner's car with petitioner and Baker followed in Miss Newsom's car out to Kings Road (910) where petitioner showed them where and how to block Mr. Surrency's car (911) and where he would wait for them (912); that petitioner then gave him the gun fully loaded (912) and that he and Baker left in Miss Newsom's car (916); that after the attempted robbery when he fired all cartridges in the gun, Baker drove the car up a dirt road which ran out and the two of them ran across a field (923) until they saw petitioner in his car and got in it (925); that they were then taken to Cracker Swamp where petitioner left them saying he would come back at night time for them (927); that after remaining in the swamp for a while during which he left his overalls, the two of them left the swamp and went on to town (934, 939-42); that he pawned the pistol (947); and that he definitely identified the revolver in court as the one used by him and given to him by petitioner (955-57.)

The testimony of James Baker, which now more than four years after the trial he attempts to repudiate in part, is substantially like that of Tyler (1027-1178).

There is a great deal of testimony to corroborate that of Tyler as to the points on which he and the petitioner did not agree. The revolver which Tyler identified in court as the murder weapon was shown to have been owned by Joe Bird who pawned it with Ed Bazar (1260). Bazar agreed to let James H. Hysler, father of the petitioner, have it (1272). W. E. Traub, who worked for Bazar, said he turned it over to James H. Hysler (1280-81). Richard Gore, a policeman, said he had seen the revolver in Bazar's place (1287) and that later in October, 1936, he saw it in the hands of Clyde Hysler (1289-90). Girvis Stephenson confirmed the statement of Gore in that he said he was present

at the time Gore stated Clyde Hysler showed a revolver but could not identify it as the one in court (1373-74). A Mrs. Bowling, who had danced and gone around with Clyde Hysler, said she saw a revolver like the one in court in Hysler's pocket two or three times in September, 1936 though she could not identify it as the revolver in court (1303-06). A fire-arms expert from the Federal Bureau of Investigation in Washington identified the bullet which had been taken from the hip of Mrs. Surrency (600, 751) as one which had been fired from the revolver in the court room (1225) and his statement confirmed that of Tyler who testified he had fired it at the holdup.

Mrs. Elizabeth Crawford stated that she was driving the car of Mrs. Bessie Wainwright on Tuesday morning November 24, 1936 and that about 11:45 A. M. she met a car in which Hysler was riding on the front seat and a negro whom she identified as Tyler driving and another negro whom she identified as Baker sitting in the back seat; that this meeting was at the corner of West Fifth Street and Huron; that Tyler honked his horn and they waited for him to turn (1343-45). This was confirmed by Mrs. Wainwright who stated she was sitting in the front seat with Mrs. Crawford (1321-25). A workman for the Atlantic Coast Line Railroad Company, J. C. Peacock, said he saw petitioner with two negroes driving on St. Clair Street, one block from Huron Street, shortly after 11:30 A. M. Tuesday morning, November 24, 1936 (1357). He could not identify the negroes but states that one was driving the car with Hysler sitting beside him and the other was in the back seat (1359).

Miss Laura Newsom confirmed the statement of petitioner that he came on Tuesday afternoon to the high school to borrow her car (1438) and said that he had asked to bor-

row it only for a short while (1439-40); that when she wanted the car about 10:30 A. M. Wednesday morning it was gone and she reported it stolen (1443); that during the afternoon while still at school she received a note; "Report your car stolen. It is all right" (1446). Bud Gardner stated that he took the note from petitioner to Miss Newsom that afternoon (1599-1602) and petitioner himself admitted that he wrote such a note and sent it by Bud (1719-20), though upon cross examination he could give no satisfactory reason why he did not tell Miss Newsom he had turned the car over to the negroes (1788-90) (1803-06).

Mrs. T. J. Baxter testified that she was driving a car in which was seated Mrs. Laura Green and Miss Barbara Atkinson on the morning of Wednesday, November 25, 1936 shortly before 10:00 A. M. when she passed the Surrency car blocked by a car used by two negroes later identified by her as Baker and Tyler (810-15); that after she had passed the two cars and stopped at Kings Road to let Miss Atkinson out she heard shooting (816); that she then drove with the two women to St. Clair Street where Miss Atkinson got out in front of the house of her grandmother (818); that while waiting for Miss Atkinson to return she saw the black negro running on St. Clair street (821) where he got in a black new looking car which left at once (822-23). Similar testimony was given by Mrs. Green (761-809) who said that she turned in the seat at the first shot and saw the light colored negro (Tyler) still shooting (773); that when their car reached the front of the house of Miss Atkinson's grandmother she saw the black negro (Baker) running and get in a new Plymouth or Pontiac sedan which left at once (777-78); that she later identified a car at the police station as the one into which she had seen the negro get (798-99, 807-08). Miss Atkinson testified to about the same facts as Mrs. Green except that she said she did not

see the negro get in the escape car because she was walking over to her mother's house (858-78).

The foregoing excerpts from the evidence given at the trial definitely show a connection of the petitioner with the crime even without the testimony of either Tyler or Baker. There is no showing that Tyler has ever repudiated his testimony and in all points except the actual conversation when the robbery was planned he was corroborated by unimpeached witnesses.

(b) WRIT OF ERROR CORAM NOBIS WILL NOT LIE BECAUSE OF FALSE TESTIMONY GIVEN AT THE TRIAL BY AN IMPORTANT WITNESS.

In the opinion of the Supreme Court of Florida there is cited to uphold this reason the case of Lamb v State, 91 Fla 396, 107 So 535, wherein it had previously considered the basis for a writ of error coram nobis in an exhaustive opinion. Cases from Arkansas, Kansas and Washington were cited as to this particular point.

Petitioner depends upon the case of Chambers v Florida, 309 U S 227, 60 S Ct 472, 84 L ed 716, as authority that where a conviction is obtained upon evidence given by a witness which evidence was obtained by threats of violence there has been a violation of the rights guaranteed by the 14th Amendment to the United States Constitution. We do not agree that the case is such an authority. It was a decision upon a petition for writ of certiorari similar to the instant case but involving four defendants and according to the opinion

"The grave question presented by the petition for certiorari, granted in forma pauperis, is *whether proceedings in which confessions were utilized*, and which culminated in sentences of death upon four young

negro men in the State of Florida, failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment." (Emphasis supplied).

Again in the same opinion the court said:

"Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined *without reliance upon confessions obtained by means proscribed* by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns." (Emphasis supplied).

It is upon these questions as expressed in the opinion and these alone that the decision was made. It is authority only that a conviction, based upon a confession illegally obtained, whether the conviction is by jury verdict or plea of guilty, must be reversed. It is certainly not authority as counsel for petitioner argues for reversal of a conviction where the defendant did not confess but denied his guilt vigorously and was convicted upon alleged false or perjured testimony whether obtained by violence or otherwise. No such point was argued in that case nor was it decided.

The case of Deiterle v State, 98 Fla 739, 124 So 47 to which petitioner refers is not in point because there it was held when the confession *of the accused* was made through hope of reward it was not freely and voluntarily made. There was no holding that the testimony of a witness given falsely because of a hope of reward would be a cause for reversal.

The case of Nickels v State, 86 Fla 298, 98 So 497, 502, 99 So 121, also cited, held that a plea of guilty entered be-

cause of fear of mob violence was not voluntarily made. Again here it is a forced confession *of the accused* and not the false testimony of a witness against the accused that is the matter involved.

The petitioner therefore has failed utterly in showing any case where the conviction was reversed because of false or perjured testimony given by an important witness.

(c) MATTERS PROPERLY PRESENTABLE FOR WRIT OF ERROR CORAM NOBIS ARE SUCH AS WOULD HAVE PREVENTED CONVICTION AND NOT SUCH AS MAY HAVE CAUSED A DIFFERENT RESULT.

The petitioner agrees that this is a correct statement of the law but in his brief says:

"Both Tyler and Baker testified falsely against the petitioner and under the same circumstances, and their testimony is the only testimony that implicates the petitioner with the crime. Without their testimony there could be no conviction."

This is not a true statement of fact and has no basis of support in the affidavits attached to the petition in the Supreme Court of Florida. There is no affidavit by Tyler that he testified falsely nor is there any statement in any one of the four affidavits made by Baker that Tyler was beaten or offered a reward to testify falsely. The only statement by Baker in these affidavits about the testimony of Tyler is that he and Tyler immediately after the killing and long before either was apprehended agreed to lay the blame upon the petitioner because of the reputation of the Hysler family, (Exhibit A to application for leave to file petition for writ of error coram nobis).

We have discussed under (a) the falsity of the state-

ment that "without their testimony there could have been no conviction".

(d) WRIT OF ERROR CORAM NOBIS IS NOT GRANTED WHERE FACTS WERE KNOWN TO DEFENDANT AT TIME OF TRIAL.

There is no real answer by petitioner to this. Reference in petitioner's brief is again made to the Chambers case when the Supreme Court of Florida granted the application. Chambers v State, 113 Fla 786, 152 So 437. Here again counsel for petitioner confuses the issue. There were four petitioners one who was convicted by a jury verdict upon his own confession and three who were convicted upon their pleas of guilty. The court in passing upon the petition said:

> "The petition then sets forth that the facts which constitute the basis of the petition were unknown to the petitioners, or to their attorneys who represented them at the trial, or to the court at the time of the trials, verdicts, sentences and judgments. These allegations are shown upon the face of the petition to be false because certainly the petitioners knew on the date of the trial about all things which they alleged happened to them prior to the date of the trial."

and again:

> "It is true that each of the petitioners testified during the trials that the confessions introduced were made freely and voluntarily and they also testified that the evidence which they gave then upon the stand was freely and voluntarily given. But, their petition alleges that this testimony was false and given under duress. This presents an issue which the petitioners are entitled to have determined by a court of competent jurisdiction."

Thus the petitions were granted, notwithstanding the fact that the petitioners knew of the facts at the time of the trial, because the confessions were obtained from them by duress and each was convicted by his own testimony as well as by that of the other three. In the instant case the petitioner Hysler was not convicted upon his own false confession or false testimony. If any of the testimony on which he was convicted was false he knew it at the time of the trial and testified then that it was false. The reason why one witness should testify falsely against him is immaterial, whether it be for fear of a beating by the police officers, the hope of any help from the state attorney in getting a pardon, or because of spite held by the witness against the defendant or for any other reason.

(e) THE ALLEGATIONS OF THE APPLICATION IN THE SUPREME COURT OF FLORIDA DO NOT SHOW THAT THE PROSECUTING ATTORNEY HAD ANY GUILTY KNOWLEDGE OF THE ALLEDGED MAL TREATMENT OR THE ALLEGED FALSITY OF THE TESTIMONY OF THE WITNESS BAKER.

Counsel for petitioner says only that in the Chambers case the prosecuting attorney had the same knowledge as in the instant case, yet the judgment of conviction was reversed. The facts upon which the decision in the Chambers case was based have been hereinbefore shown to be entirely different from those in the instant case.

(f) THE ALLEGATIONS OF THE APPLICATION IN THE SUPREME COURT OF THE STATE OF FLORIDA DO NOT SHOW THAT ANY ALLEGED MAL TREATMENT OF THE WITNESS BAKER WAS INFLICTED BY OR KNOWN TO ANY OFFICER OF THE TRIAL COURT.

Counsel for petitioner enter a blanket denial of the facts

stated under this heading without reference to any allegation in the petition or the supporting affidavits. Baker in his affidavits clearly states that the police officers of the city of Jacksonville were the ones who beat him at Marietta (Exhibit B) and at the police station (Exhibit C) and when asked by counsel for petition if the State Attorney knew he was beat up to make him testify said: "none of the sheriff's force knew it at the time" (Exhibit C).

A reference is made by counsel for petitioner to the Chambers case that "a convict guard *** was the one who inflicted the most mal-treatment on the accused was not an officer of the trial court". In the Chambers case however the testimony of both the state witnesses and the defendants shows that it was the sheriff who supervised the procedure of continued interrogation and that the officers of Broward County were in the jail almost continuously during the whole week of questioning the defendants. The opinion (309 U S 235) says:

> "And from arrest until sentence to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the surprise confessions."

It can not be correctly stated that there is any comparison between the Chambers case involving confessions of the defendants under such circumstances and in the instant case involving alleged false testimony where there is no evidence that the ones claimed to have exerted the influence on Baker were ever present during the time he was on the stand as a witness against the petitioner.

(g) THE RECORDS SHOW THAT THE TRIALS OF BOTH THE PETITIONER AND THE WITNESS BAKER WERE CONDUCTED BY ABLE, DILIGENT AND FAITHFUL COUNSEL

AND THAT THE CONVICTION OF PETITIONER WHILE BEFORE IN TIME TO THAT OF THE WITNESS BAKER WAS AFFIRMED BY THE SUPREME COURT OF FLORIDA AFTER THE CONVICTION OF BAKER.

Counsel for petitioner comment only upon an error in the opinion of the Supreme Court of Florida which states that the trial of Hysler for the killing of Mrs. Surrency was after the trial of Baker. The date of the two trials has no bearing upon the issuance of the writ of error coram nobis and the basis of this ground in the opinion of the Supreme Court of Florida is that each of the two defendants "had able, diligent and faithful counsel" in the trial of their cases and the presentation of possible errors upon the appeal to the Supreme Court of Florida. In the Chambers case the point was presented, though not pressed, that the defendants were denied proper counsel based upon a decision made shortly theretofore by the Supreme Court of the United States in the case of Powell v Alabama, 287 U S 45, 52 S Ct 55, 77 L ed 158.

The petitioner Hysler was represented by private counsel both at the trial and in his appeal as well as in his application for leave to apply for writ of error coram nobis and it is well known that his family was at the time of the trial and since then well able to employ any counsel who would be willing to accept the case.

(b) IF ALL THAT IS ALLEGED IN HIS APPLICATION HAD BEEN TRUE AND HAD BEEN FULLY MADE KNOWN TO THE TRIAL COURT AND TO THE JURY WHICH TRIED THE DEFENDANT-PETITIONER, IT WOULD NOT HAVE PRECLUDED THE ENTRY OF THE JUDGMENT UPON A VERDICT OF GUILTY OF MURDER IN THE FIRST DEGREE HAVING BEEN RETURNED BY THE JURY.

This is a restatement in different form of the grounds

stated under (c). We have discussed the evidence thoroughly under (a) and believe that it clearly shows that the jury could have convicted the defendant of murder in the first degree even though the testimony of the witness Baker was not allowed to be given because of the facts alleged in his various affidavits.

CONCLUSION

The brief in behalf of the petitioner for writ of certiorari is prepared on the theory that the instant case is on all fours with the Chambers case.

As we have pointed out herein such is not true for the petitioner here did not make any confession nor give any false testimony under duress. The witness Baker says his testimony was false and given under duress but as to the testimony of Tyler there is only the statement of the petitioner and Baker that it was false and the petitioner at the trial testified in his own behalf that both the testimony of Tyler and Baker was false.

The application of the petitioner in the Supreme Court of Florida alleges in paragraph 4 that two witnesses Alvin Tyler and James Baker were "coerced, intimidated, beaten, threatened with violence and otherwise abused, and mistreated in order to compel the said witnesses *** to implicate said petitioner in the killing of Mrs. Mamie Surrency" and also that they "were promised immunity from the electric chair by J. W. Harrell *** if they would implicate Clyde Hysler in said murder" which allegations are stated to be made not upon personal knowledge of the petitioner but upon the attached affidavits of James Baker, one of the witnesses. To support the affidavits of Baker which claimed that Joe Peterson rather than Clyde Hysler hired Baker and Tyler to commit the robbery there are attached four

affidavits by different individuals claiming that Peterson had told them either before or after the attempted robbery that he was the one responsible for it but these affidavits do not state that Peterson said he was the sole person interested in the robbery nor that Clyde Hysler was not also implicated in it.

The affiant Baker is not consistent in his statements. He says in his first affidavit (Exhibit A) in the narrative form where he was not prompted by any questions that he and Tyler agreed "while they were in Cracker Swamp *** that they would lay the blame of the planning of the robbery of the Surrancys upon Clyde Hysler because they had had considerable liquor dealings with Clyde Hysler and knew him well".

In his second affidavit (Exhibit B) the matter is brought up only by direct questions by Hysler's counsel as follows: "Now what threats or promises did they make you to testify and implicate Clyde Hysler"., (page 1) and "if it had not been for the beatings and threats and promises to get you out of here in three years as you have stated above, would you have implicated Mr. Hysler in the case at all?" (Page 3.) No direct answer was given to the first question and only a simple "No, sir" to the second.

In the third affidavit (Exhibit C) it is in response to a question by counsel for petitioner "did any of them tell you that Clyde Hysler was mixed up in the killing or such as that" that affiant said: "they said they knew he was in it—and after I told them how it was they made me implicate him".

It is plainly shown that until direct questions were asked by counsel for the petitioner calling for affirmative answers Baker did not claim his false testimony to blaming

the robbery on Clyde Hysler was due to any beatings by law officers but it was based upon an agreement between himself and Tyler made immediately after the attempted robbery. He also gave as a reason for blaming it on Hysler that they (Tyler and Baker) knew him well from frequent liquor dealings. Hysler on his direct testimony stated that he had never seen Tyler before the afternoon of November 24, 1936 when Baker said he wanted to take Tyler with him (BE 1703-04). Tyler also said that he first saw Hysler on November 24, 1936 when Hysler came after Baker (883, 892).

We believe that we have fully answered every claim made by petitioner that the ruling of the Supreme Court of Florida was in error and that he was deprived of the rights guaranteed to him by the 14th Amendment to the Constitution of the United States of America. It is therefore urged that the petition for writ of certiorari be denied.

Respectfully submitted,

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NATHAN COCKRELL, Assistant Attorney General of the State of Florida.

Counsel for Respondent.